

APPEAL NO. 041928
FILED SEPTEMBER 29, 2004

This appeal arises pursuant to the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq.* (1989 Act). A contested case hearing (CCH) was held on July 1, 2004. The hearing officer determined that: (1) the respondent (claimant) sustained a compensable injury on _____; (2) the claimant's compensable injury of _____, extends to include the cervical spine; (3) the claimant did not waive the right to pursue workers' compensation benefits; (4) the claimant failed to timely file a claim, however, the appellant (carrier) is not relieved from liability under Section 409.004 because the carrier failed to timely contest compensability of the claim. The carrier appealed the hearing officer's determinations and asserted that the issue of carrier waiver was not before the hearing officer. The appeal file does not contain a response from the claimant.

DECISION

Affirmed on other grounds.

It is undisputed that the claimant was injured in a motor vehicle accident (MVA) while in the course and scope of employment on _____. The claimant testified that he did not pursue a workers' compensation claim for this injury until August 2001. The carrier argued that the claimant filed a claim for this injury in October 2001. The claimant testified that he continued to work after his injury of _____, until he sustained another work-related injury on (subsequent date of injury).

TIMELY FILING AND WAIVER

Section 409.004 provides that the failure to file a claim for compensation with the Texas Workers' Compensation Commission (Commission) as required under Section 409.003 relieves the employer and the employer's insurance carrier of liability under this subtitle unless:

- (1) good cause exists for failure to file a claim in a timely manner; or
- (2) **the employer or the employer's insurance carrier does not contest the claim.** [Emphasis added.]

A carrier may be relieved of liability if an injured worker fails to timely file a claim for compensation within one year after the date of injury; however, a carrier is not relieved of liability for such failure if the carrier does not contest the claim. In Texas Workers' Compensation Commission Appeal No. 020375, decided March 28, 2002, we said.

[T]he failure to timely file a claim does not extinguish this claimant's right to benefits, but may relieve the carrier of the legal liability to pay those

benefits. When such a claim is filed more than one year after the date of injury, it is payable only under two circumstances. Either, there is good cause for untimely filing . . . or the carrier does not contest the claim. Section 409.004(2). The 1989 Act in Section 409.021(c) and (d) specifies how and when a contest must be made: existing defenses (such as failure to file a claim within one year) must be raised by the carrier within 60 days of notice of the claim; other defenses not reasonably discoverable earlier may be raised by the carrier when discovered. A defense to liability is lost if not timely and expressly contested as required by Sections 409.004(2) and 409.021(c) of the 1989 Act. Texas Workers' Compensation Commission Appeal No. 94224, decided April 1, 1994

Section 409.021 provides, in pertinent part, that for injuries occurring prior to September 1, 2003, an insurance carrier shall, not later than the seventh day after the receipt of written notice of an injury, begin the payment of benefits as required by the 1989 Act or notify the Commission and the employee in writing of its refusal to pay benefits. See Continental Casualty Company v. Downs, 81 S.W.3d 803 (Tex. 2002).

In the instant case the hearing officer found that the claimant did not have good cause for failing to file a claim with the Commission within one year. The remaining question was whether the carrier contested the claimed injury under Section 409.021, to relieve the carrier of liability under Section 409.004(2).

In evidence is an Employee's Notice of Injury or Occupational Disease & Claim for Compensation (TWCC-41) date stamped as being received by the Commission on November 2, 2001. (Carrier's Exhibit B, page 2 and 7). Also, in evidence are several Payment of Compensation or Notice of Refused/Disputed Claim (TWCC-21) forms that reference a date of injury of _____. First, a TWCC-21 date stamped as received by the Commission on March 22, 2002, reflects that it was filed by another carrier that did not provide coverage for this claim; that it received first written notice on March 19, 2002; and that it was contesting coverage of the claim. (Carrier's Exhibit B, pages 2 and 8). We note that the hearing officer in the Background Information section of the decision and order incorrectly referenced this TWCC-21 as being filed by the present carrier, rather than another carrier, and that this TWCC-21 was filed on March 26, 2002, rather than March 22, 2002, (Carrier's Exhibit B, pages 2 and 8). Second, a TWCC-21 date stamped as received by the Commission on March 25, 2002, reflects a "TWCC # _unknown," a date of injury of (subsequent date of injury), that the carrier received first written notice on February 22, 2002, and that the "Carrier admits that claimant was involved in an accident in course and scope of employment on _____. . . ." "Carrier denies any and all disability and impairment due to the date of injury of _____." (Carrier's Exhibit B, page 2 and Carrier's Exhibit C, page 42) Third, a TWCC-21 dated stamped as received by the Commission on October 7, 2002, reflects that the carrier received first written notice on July 16, 2001, and that the carrier is asserting an election-of-remedies defense (Carrier's Exhibit B, page 2 and Claimant's Exhibit No. 2, page 3). Finally, a TWCC-21 date stamped as received by the Commission on May 13, 2004, reflects that there is no date listed of when the carrier

received first written notice, and the carrier is asserting a timely filing defense (Claimant's Exhibit No. 2, page 1).

The hearing officer found that the carrier received first written notice of the injury by November 6, 2001, and that the carrier filed the first TWCC-21 contesting the claim on March 26, 2002. The carrier argues that both these findings are not supported by any documentary evidence or testimony by any witness. We agree. Review of the record reflects that for the November 6, 2001, date the hearing officer went outside of the record and for the March 26, 2002, date the hearing officer referenced a TWCC-21 from another carrier that did not provide coverage for this claim.

With regard to first written notice, the hearing officer comments in the Background Information:

Commission procedure is to provide written notification to the Claimant and the Carrier after it receives a TWCC-41. A letter is placed in the Carrier's box in Austin and the Carrier should receive the notice within ten (10) days of the Commission's receipt of the TWCC-41.

Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 124.1(c)(1) (Rule 124.1(c)(1)) provides that the Commission shall furnish written notification to the carrier when a source other than the carrier reports an injury that may cause the employee 8 days or more of disability or has resulted in a impairment. However, we have found no rule that requires the Commission to send a TWCC-41 to a carrier when it is filed. Further, there is no evidence in the record that a Commission procedure exists or was followed in this case to send the TWCC-41 to the carrier within 10 days of receipt. Accordingly, we strike Finding of Fact No. 6 that the carrier received first written notice of injury on November 6, 2001.

With regard to when the carrier contested the claim by filing a TWCC-21 with the Commission, the hearing officer comments in the Background Information that the "Carrier produced documentation showing that it filed the first TWCC-21 contesting the claim on March 26, 2002." Review of the record reflects that the hearing officer referenced a TWCC-21 that was filed by another carrier that did not provide coverage for this claim. Additionally, the hearing officer incorrectly finds that this particular TWCC-21 was filed on March 26, 2002, rather than March 22, 2002, as evidenced by the date stamp. The hearing officer improperly considered a TWCC-21 from another carrier. (Carrier's Exhibit B, page 8). Accordingly, we strike Finding of Fact No. 7 that the carrier filed the first TWCC-21 contesting the claim on March 26, 2002.

Although the hearing officer's findings of fact are erroneous, as explained above, the hearing officer's conclusion of law that the carrier failed to timely contest compensability of the claimed injury is affirmable, albeit on other grounds.

There are three other TWCC-21s in evidence and they are the only evidence of when the carrier first received written notice of the claim and when it first filed its contest

of compensability for the claim with the Commission. The carrier filed a TWCC-21 on March 25, 2002, showing the date of first written notice as February 22, 2002. The carrier filed another TWCC-21 on October 7, 2002, showing the date of first written notice as July 16, 2001. The carrier filed its last TWCC-21 on May 13, 2004, but it gave no date for the first written notice of the claim. Considering this evidence most favorably to the carrier, the latest date the carrier received written notice of the claim was February 22, 2002, and the earliest date the carrier filed a TWCC-21 with the Commission was March 25, 2002. The evidence reflects that the carrier did not contest compensability of the claimed injury of _____, prior to the expiration of the waiver period as required by Section 409.021; therefore, the carrier waived the right to contest compensability.

We disagree with the carrier's argument that waiver was not an issue before the hearing officer, because the hearing officer had to determine whether the carrier contested the claimed injury under Section 409.021, to ultimately determine whether the carrier is relieved of liability under Section 409.004(2). Since the carrier lost its right to contest compensability by not complying with the requirements of Section 409.021, it lost its right to assert a defense under Section 409.004 based upon the claimant's failure to timely file a claim for compensation. Texas Workers' Compensation Commission Appeal No. 022027-s, decided September 30, 2002. Consequently, the carrier is not relieved of liability under Section 409.004.

INJURY, EXTENT OF INJURY, AND ELECTION OF REMEDIES

We have reviewed the complained-of determinations regarding whether the claimant sustained a compensable injury on _____, whether the compensable injury of _____, extends to include an injury to the cervical spine, and whether there was a knowing election of remedies by the claimant. We conclude that the issues involved fact questions for the hearing officer. The hearing officer reviewed the record and decided what facts were established. We conclude that the hearing officer's determinations are supported by the record and are not so against the great weight and preponderance of the evidence as to be clearly wrong or manifestly unjust. Cain v. Bain, 709 S.W.2d 175, 176 (Tex. 1986).

The hearing officer's decision and order are affirmed, on other grounds.

The true corporate name of the insurance carrier is **SOUTHERN INSURANCE COMPANY** and the name and address of its registered agent for service of process is

**FRANCIS FAYE
c/o J. I. SPECIALTY SERVICES
9229 WATERFORD CENTRE BOULEVARD, SUITE 100
AUSTIN, TEXAS 78758.**

Veronica L. Ruberto
Appeals Judge

CONCUR:

Robert E. Lang
Appeals Panel
Manager/Judge

Margaret L. Turner
Appeals Judge